No. 11578

In the United States Circuit Court of Appeals for the Ninth Circuit

MICHAEL DOWNS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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CITATIONS

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OPINION BELOW

The only previous opinion in this case is that of the Tax Court (R. 51–68) which is reported in 7 T. C. 1053.

JURISDICTION

This petition for review involves a deficiency in income tax of the petitioner in this case (hereinafter referred to as the taxpayer) for the year 1943 in the amount of $225.79. (R. 68–69, 70–77.)

On August 28, 1945, the Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency in income tax for the year 1943. (R. 8–12.) Within 90 days thereafter, namely, on November 21, 1945

(R. 2), the taxpayer filed with the Tax Court a petition (R. 4–12) for a redetermination of the deficiency, pursuant to Section 272 of the Internal Revenue Code. On October 25, 1946, the Tax Court entered its decision, sustaining the deficiency in the amount determined by the Commissioner. (R. 68–69.) Within three months after that decision, namely, on January 21, 1947 (R. 3), the taxpayer filed his petition (R. 70–77) for a review of the decision of the Tax Court, under the provisions of Sections 1141–1142 of the Internal Revenue Code. By stipulation in writing (R. 69–70) the parties herein have designated this Court as the court for review.[1]

QUESTION PRESENTED

Was the taxpayer a bona fide resident of a foreign country or countries during the taxable year 1943 and thus entitled, under Section 116 (a) of the Internal Revenue Code as amended by Section 148 of the Revenue Act of 1942, to an exemption for salary received from sources without the United States?

STATUTE AND REGULATIONS INVOLVED

The statute and Regulations involved are set forth in the Appendix, *infra,* pp. 31–35.

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[1] A similar stipulation for a review by this Court has been entered into by the parties in the companion case of *Eleanor J. Downs* v. *Commissioner*, cause No. 11579 in this Court, in which the taxpayer's wife is the petitioner, and which case, by further stipulation of the parties, is to abide by the result in the instant case.

STATEMENT

The facts as stipulated (R. 14–17) and as found by the Tax Court (R. 54–60) are as follows:

Taxpayers Michael Downs and Eleanor J. Downs are husband and wife, citizens of the United States, residing in Los Angeles, California. Taxpayer Michael Downs timely filed an income tax return for the taxable year 1943 with the Collector of Internal Revenue for the District of Maryland. Taxpayer Eleanor J. Downs filed no return for the taxable year 1943. (R. 54.)

Early in 1942 Lockheed Aircraft Corporation entered into a contract with the United States Government in which the corporation agreed to organize, equip and operate an aircraft depot in Northern Ireland in connection with the war effort. The project was designated by the United States Army as operation "Magnet." In connection with the operation it was necessary for Lockheed Aircraft Corporation and its wholly owned subsidiary, Lockheed Overseas Corporation, sometimes hereafter referred to as Lockheed, to employ large numbers of skilled men in the United States and transport them to the British Isles. It was estimated that some 5,400 American citizens at one time or another, counting those who came over and returned before the completion of the job, were employed by Lockheed at the aircraft depot in Northern Ireland. (R. 54–55.)

From January 1 to June 30, 1942, taxpayer was employed as an aircraft mechanic in the United

States by Lockheed Aircraft Corporation at Burbank, California. (R. 55.)

On or about April 23, 1942, taxpayer made out and signed a formal application for overseas employment with Lockheed and in connection with such application signed a contract shortly thereafter with the corporation in which he agreed to perform services for the company at an aircraft depot to be operated by it in the British Isles. The application which taxpayer signed for employment with Lockheed was headed: "Application for Foreign Service." The application contained the following question (R. 55):

> Are you willing to go to any part of the world? Yes.
> For how long? 1 year— 2 years— Longer—X.

Taxpayer in his application for foreign service thus indicated a willingness to serve as an employee of Lockheed overseas for more than two years, if necessary. The contract which taxpayer signed provided *inter alia* as follows (R. 55–57):

> ARTICLE 1. Time and Duration of Employment
>
> Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge of the conditions recited above. Subject to the terms and conditions hereinafter set forth, Employee's employement hereunder shall commence when he reports for duty at a point within the United States to be designated by Contractor, at the time and place designated by Contractor, and shall continue until November 1, 1942, or such later date as may be agreed

upon and thereafter until sixty (60) days after return transportation to the United States is made available by Contractor, it being understood that such return transportation shall be available on November 1, 1942, or the later date agreed upon or as soon thereafter as is practicable under the circumstances then existing.

ARTICLE 7, Housing, Subsistence and Medical Services

During the time that Employee is employed hereunder and remains at the place or places of his duty outside of the United States, Contractor shall furnish or cause to be furnished, without cost to Employee, such adequate food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances may reasonably permit.

Employee shall submit prior to departure and from time to time during his employment to such vaccination, inoculation, and/or any other medical, dental, surgical, nursing, and/or hospital treatment, preventative or curative, as the Contractor or other medical staff at the destination or elsewhere may from time to time specify, without expense to employee.

Contractor may direct the return to the United States of Employee, if in Contractor's judgment Employee's health condition is unfavorable.

ARTICLE 9. Taxes

Contractor shall either pay or reimburse Employee for any and all taxes lawfully levied or assessed by any foreign Government against Employee with respect to his residence, occu-

> pation, salary, or income, provided, however, that Employee shall immediately notify Contractor in writing of any such levy or assessment and that Employee shall not pay any of such taxes as Contractor may direct him not to pay and that any claim for reimbursement shall be asserted in writing to Contractor within thirty (30) days after such payment, and provided further that Contractor shall save Employee harmless from any monetary loss resulting from or occasioned by Employee's failure to pay such taxes in compliance with instructions or directions given by Contractor.

Pursuant to the terms of his contract, taxpayer left the United States for the British Isles on June 30, 1942, and landed several weeks later in Glasgow, Scotland. (R. 57.)

Taxpayer was admitted to the British Isles on a visa as an employee of Lockheed. This visa, under British law, had to be put in use within three months from the date it was issued but the time that the holder would be allowed to stay is not mentioned therein. The visa, under British law, would permit him to remain for the purpose for which it was given, as an employee of Lockheed, and if and when Lockheed terminated its work over there, taxpayer would be expected to depart within a reasonable time when transport was available and subject to any extensions that might be given him by the home office in London or local authorities in Belfast. (R. 58.)

After disembarking taxpayer was first assigned to an R. A. F. base near Liverpool, England, in the capacity of a field and service mechanic. Later he

was transferred to Ireland for a short time after which he was moved from time to time to different air bases in England and Ireland where he performed essential services for the British Air Force, the American Air Force and the Polish Air Force, always as an employee of Lockheed. (R. 58.)

The expiration date of taxpayer's contract was extended by agreement of the parties until May 1, 1943, at which time he entered into a new contract with Lockheed. This new contract provided, *inter alia,* as follows (R. 58–59):

> ARTICLE 1. Time and Duration of Employment
>
> Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge of the conditions recited above. The term of Employee's employment hereunder shall * * *
> * * * continue, subject to the terms and conditions hereinafter set forth, for (i) the duration of the contract between the Government and Lockheed as from time to time extended and for such period after the termination or completion of said contract as Contractor may, in respect of such Employee, deem necessary for the winding up of the operations carried on under said contract after such termination or completion; and (ii) thereafter until return transportation to the United States for such Employee is made available by Contractor or by the Government to Contractor which transportation Contractor shall use its best efforts

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> to obtain as promptly after the end of the period described in the foregoing clause (i) as is practicable under the circumstances then existing; * * *

The taxpayer remained in the employ of Lockheed stationed in the British Isles and Northern Ireland until July 12, 1944, when he returned to the United States and to the address where he now resides in Los Angeles, California. During the period of taxpayer's absence from the United States, his wife Eleanor remained in the United States with taxpayer's three minor children and lived at the family residence in Los Angeles. (R. 59.)

Taxpayer received as compensation for personal services rendered to Lockheed in the British Isles and Northern Ireland during the year 1943 the sum of $5,438.50 of which 90 percent was deposited by the corporation to the account of the taxpayer with the California Bank in Los Angeles pursuant to Article 2 of his employment contract. (R. 59–60.)

Taxpayer did not at any time make application to become a citizen of Northern Ireland or a British subject. During the taxable year 1943 he was domiciled in the United States and intended to return to this country as soon as the war in Europe was over. He did not pay any income taxes to the Government of Northern Ireland or the United Kingdom of Great Britain for the year 1943. (R. 60.)

The Tax Court, concluding that the taxpayer during the taxable year 1943 was not "a bona fide resident of a foreign country or countries" within the meaning of Section 116 (a) of the Internal Revenue Code as

amended by Section 148 of the Revenue Act of 1942, determined the deficiency in income tax which is here in controversy.

SUMMARY OF ARGUMENT

The taxpayer was not entitled during the taxable year 1943 to the exemption from federal income taxes granted by Section 116 (a) of the Internal Revenue Code as amended by Section 148 of the Revenue Act of 1942. The conclusion of the Tax Court that the taxpayer did not qualify for the exemption because he was not a bona fide resident of the British Isles and Northern Ireland during that year is fully supported by the evidence.

Prior to its amendment by Section 148 of the Revenue Act of 1942, Section 116 (a) of the Internal Revenue Code granted an exemption from federal income taxes with respect to earned income to a United States citizen who was physically absent from the United States for more than six months during the taxable year. The section used the term "bona fide non-resident." The amended section, applicable during the year 1943 accords the exemption only to a citizen "who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year."

The amendment in the Revenue Act of 1942 did not subject to the income tax all United States citizens living abroad but, on the other hand, it did not exempt from the income tax all citizens who were abroad even though they may have been employed in a foreign

country during an entire taxable year. The amendment plainly imposed a new test, bona fide residence in a foreign country. The legislative history of the amended section clearly shows that the new test to be applied is generally the test which has been employed for determining whether an alien is a resident of the United States. That test involves a determination of the intention of the citizen with regard to the length and nature of his stay. The evidence clearly shows that the taxpayer went to the British Isles and Northern Ireland for a definite purpose. It shows that the taxpayer went there for a definite purpose and that he did not intend to remain there more than temporarily. His was no mere floating intention to return to the United States; it was definite and fixed. His sole purpose was to earn money by working there temporarily for his employer. His return transportation was arranged before he left the United States. In the British Isles and Northern Ireland he formed no attachments indicating an intention to remain there indefinitely. He intended at all times to return to this country upon completion of his employment contracts there.

Section 116 (a) as amended was not intended to benefit persons who work only temporarily outside the United States as did the taxpayer. To the contrary we think that the purpose of the amendment in the Revenue Act of 1942 was to subject such persons as the taxpayer to federal income taxes.

ARGUMENT

I. The Tax Court was correct in holding that the taxpayer was not a bona fide resident of the British Isles and Northern Ireland during the taxable year 1943

Section 116 (a) of the Internal Revenue Code, as amended (Appendix, *infra*), grants exemption from federal income taxes to a citizen of the United States with respect to earned income as defined by Section 25 (a) of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 25), provided that the citizen "establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year." The only issue presented here is whether the Tax Court erred in its conclusion that the taxpayer was not a bona fide resident of the British Isles and Northern Ireland during the taxable year 1943.

It is generally recognized that "resident" is a word which gains meaning from its context and the legislative purpose for which it is used in a statute. It does not have a fixed meaning which is the same wherever it is used. In some instances the word has a meaning substantially similar to "domicile"; in others it means something less. See *Commissioner* v. *Swent,* 155 F. 2d 513 (C. C. A. 4th), certiorari denied, 329 U. S. 801; *Hunter* v. *Bremer,* 256 Pa. 263, 100 Atl. 809. We believe, therefore, that the legislative history of Section 116 (a), as amended, must be examined to ascertain what persons Congress intended to benefit by the section.

It is true that Section 116 (a) of the Internal Revenue Code as originally enacted was designed

to encourage American citizens to go to other countries for commercial and other purposes. House Hearings on Revenue Revision, 1925, pp. 176–185. However, it seems clear that it was the intention of Congress that the tests to be employed in administering Section 116 (a) of the Internal Revenue Code as amended by the Revenue Act of 1942 (Appendix, *infra*) were generally those tests applicable in determining whether an alien is a resident of the United States. *Swenson* v. *Thomas,* 68 F. Supp. 390, (N. D. Tex.) now on appeal to the Circuit Court of Appeals for the Fifth Circuit; Section 29.211–2 of Treasury Regulations 111 (Appendix, *infra*) which relates to the residential status of aliens in the United States. The Tax Court decided that the taxpayer did not bring himself within the exemption provided by the amended section. (R. 60–68.)

The theme of the taxpayer's brief in this case seems to be that neither the administrators of the tax laws in the Bureau of Internal Revenue nor the courts which have been called upon to construe Section 116 (a) have understood its real purpose and meaning. The taxpayer seems to agree that the tests applied for ascertaining whether an alien is a resident of the United States are relevant here, but he contends that in the instant case they must be applied in proper perspective as to the history, intent and purpose of the statute to the facts at hand. If we understand the taxpayer's position, it is that he has brought himself within the spirit and purpose of the statute, its purpose being to foster foreign trade and commerce.

It is our contention that the Tax Court was correct in its position that the tests to be applied in determining whether a taxpayer was a resident of a foreign country during a taxable year are generally those tests prescribed for determining whether an alien is a resident of the United States. *Johnson* v. *Commissioner*, 7 T. C. 1040, 1044–1045, Section 29.116–1 of Treasury Regulations 111 (Appendix, *infra*) so provides.

The Tax Court applied those tests in the instant case and concluded that the taxpayer did not qualify for the exemption. Unless the Tax Court made a clearly erroneous finding of ultimate fact after applying these tests, its judgment should be affirmed. If its ultimate finding was clearly erroneous, the judgment should, of course, be reversed or remanded. We think that on the record in this case the conconclusion of the Tax Court that the taxpayer was not a bona fide resident of the British Isles and Northern Ireland during the taxable year involved is amply supported.

We are aware that Section 116 (a), as originally enacted, was intended to stimulate foreign trade. The legislative history of the present amended section, which we shall discuss in this brief, discloses, however, that the amended section was not intended to benefit all persons employed outside the United States in commercial activities. The amended section was intended to benefit only a "bona fide resident of a foreign country or countries." The legislative history also shows that the tests to be applied were generally

those tests applied in determining whether an alien is a resident of the United States.

The exemption granted by Section 116 (a) is a matter of legislative grace, there being no question whatever of the power of Congress to tax the income of citizens of the United States wherever it is earned. *Cook* v. *Tait,* 265 U. S. 47. Statutes which grant exemption from taxation are not to be extended by implication and analogy. *United States* v. *Stewart,* 311 U. S. 60, 71. Therefore, unless the taxpayer has brought himself squarely within the provisions of Section 116 (a) he is not entitled to the exemption.

A. Section 116 (a) as originally enacted granted an exemption to a bona fide non-resident of the United States during more than six months of a taxable year

The exemption granted by Section 116 (a) (Appendix, *infra*) was first written into the tax law in the Revenue Act of 1926, c. 27, 44 Stat. 9, as Section 213 (b) (14). It was extended to a person who was a "bona fide non-resident" of the United States for more than six months during the taxable year. The new provision in that Act was referred to as the "foreign trade exemption" and was intended to stimulate foreign trade by giving to salesmen and traders the same tax advantage provided by other countries. H. Rep. No. 1, 69th Cong., 1st Sess., p. 7 (1939–1 Cum. Bull. (Part 2) 315, 320). The provision as originally written was stricken out by the Senate Committee on Finance, S. Rep. No. 52, 69th Cong., 1st Sess., pp. 20–21 (1939–1 Cum. Bull. (Part 2) 332, 348). It was restored, however, in the Senate. See Conference

Committee Report, H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 33 (1939–1 Cum. Bull. (Part 2) 361, 364).

The Senate amendment introduced into the language of the section the words "a bona fide non-resident of the United States." The debate of the amendment on the floor of the Senate shows that the exemption was intended to be accorded to persons physically absent from the United States for more than six months of the taxable year. This is shown by a statement on the floor of the Senate by Senator Smoot, Chairman of the Senate Finance Committee, who sponsored the bill in the Senate. Senator McKellar asked whether the amendment affected any of the employees of the Government and Senator Smoot replied (67 Cong. Record, Part 4, p. 3781):

> It does, as well as individual citizens. Sometimes their occupations keep them abroad for nine months of the year. *We simply say that if they are out of the United States for six months, then they are to be treated the same as if they lived in a foreign country all the time.* There is no possible objection to it. [Italics supplied.]

In the light of the legislative history of the section the Bureau of Internal Revenue interpreted it to mean that a citizen was entitled to the exemption if he was physically absent from the United States for more than six months of the year. No formal regulations were issued but the Bureau's interpreta-

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tion was stated in several rulings. In S. M. 5446, V–1 Cum. Bull. 49 (1926), it was said (pp. 49–50):

> This [the legislative history] would indicate that the exemption was intended to be accorded to all citizens of the United States who are actually out of the United States for more than six months during the year and who perform personal services without the United States.
>
> It is the opinion of this office, therefore, that the expression "bona fide nonresident of the United States for more than six months" as used in Section 213 (b) (14) applies to any citizen who is actually without the United States for more than six months during the taxable year * * *

It was also said (p. 49):

> The citizen is not required to be a resident of any foreign country; he is only required to be nonresident of the United States for more than six months. The domicile has no bearing on the question.

This interpretation was issued in 1926. Subsequent rulings by the Bureau of Internal Revenue followed this interpretation. See G. C. M. 9848, X–2 Cum. Bull. 178, 179 (1931), and G. C. M. 22065, 1940–1 Cum. Bull. 100.

The Commissioner of Internal Revenue applied this test from 1926 until 1942 when the section was amended. In each succeeding Revenue Act from 1926 to 1942, Congress re-enacted the section in substantially the same language as was contained in Section 213 (b) (14) of the Revenue Act of 1926 (except for

an amendment in the Revenue Act of 1932, which denied the exemption to Government employees).[2] The test applied by the Commissioner has been upheld by the only Circuit Courts of Appeals that have construed the section. *Commissioner* v. *Fiske's Estate,* 128 F. 2d 487 (C. C. A. 7th), certiorari denied, 317 U. S. 635; *Commissioner* v. *Swent,* 155 F. 2d 513 (C. C. A. 4th), certiorari denied, 329 U. S. 801;[3] *Swent* v. *United States,* decided by this Court on July 21, 1947, not yet reported.

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[2] Section 116 (a), Revenue Act of 1932, c. 209, 47 Stat. 169.

[3] The Circuit Courts of Appeals in these cases reversed the decisions of the Board of Tax Appeals in *Estate of Fiske* v. *Commissioner*, 44 B. T. A. 227, and the Tax Court in *Swent* v. *Commissioner*, 5 T. C. 33.

In *Carstairs* v. *United States* (E. D. Pa.), decided January 15, 1936 (17 A. F. T. R. 1044), a District Court rejected the Commissioner's interpretation of Section 116 (a). In that case the taxpayer had spent the first seven weeks of the year in the United States and returned to England, where he had long been a resident, for the balance of the year, but died in July. He had thus been a non-resident just short of six months. The Commissioner ruled that he was not entitled to the exemption provided by Section 116 (a), but the District Court ruled that physical absence during six months of the year was not essential in order to qualify for the exemption, stating (p. 1045):

"But residence means something other than mere physical presence in a particular place. Of course, physical presence for some substantial part of the time is necessary and it may sometimes be a controlling factor (a man who has never been in England cannot have a residence there), but a factor at least equally important is the state of mind of the subject of the inquiry. To ascertain that, his prior and subsequent life is all more or less relevant and for that purpose the evidence offered in this case of the decedent's occupation, ownership of houses, business and customary modes of living dating back to 1905 and appearing in the stipulation, as well as the evidence of the passports and other declarations appearing in the testimony is admitted and considered."

B. The test to be applied under Section 116 (a) as amended by Section 148 of the Revenue Act of 1942 is generally the test for ascertaining whether an alien is a resident of the United States

Section 148 of the Revenue Act of 1942 amended Section 116 (a) of the Internal Revenue Code to grant an exemption from federal income taxes to a citizen of the United States who "establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year." The amended section plainly imposed a new test. The emphasis is no longer upon mere non-residence of this country; it is upon residence in a foreign country or countries. The legislative history and the administrative interpretation of the section show clearly that the test to be applied in the administration of the amended section is the test generally applicable for ascertaining whether an alien is a resident of the United States.

The revenue bill passed by the House of Representatives for the year 1942 (H. R. 7378) repealed Section 116 (a). The action was explained by the Ways and Means Committee report, as follows (H. Rep. No. 2333, 77th Cong., 1st Sess., p. 93 (1942–2 Cum. Bull. 372, 412)):

> Under Section 116 (a) of the Internal Revenue Code, a citizen of the United States residing outside the United States more than six months during the taxable year is exempt from tax on his earned income from such outside sources, except in case of such income paid by the United States or any of its agencies. The repeal of this provision of the bill will not only serve revenue needs but will also remove

existing unjust discrimination favoring individuals receiving their compensation from non-governmental sources.

After this bill passed the House of Representatives, hearings were held by the Senate Committee on Finance with respect to the repeal of Section 116 (a). We believe that a statement by the Chairman of the Senate Commitee on Finance in the course of these hearings is revealing of the intent of the Committee which wrote the 1942 amendment. Senator George stated (Hearings before Committee on Finance, United States Senate, on H. R. 7378, 77th Cong., 2d Sess., Vol. 1, p. 743):

> Maybe we might shorten your testimony here on this point with this statement; I think it is recognized that the complete elimination of Section 116 (a) was not really intended, that it was not the primary purpose in the case of the bona fide, non-resident American citizen who established a home and maintains his establishment and is taking on corresponding obligations of the home in any foreign country, but there is some need for treatment of this section, so that the technicians, American citizens who are merely temporarily away from home could be properly reached and properly dealt with for taxation purposes.
>
> I make this statement to you in the beginning in the hope that it might relieve some of the burden from you. * * *

Basically, it was this policy which the Senate Committee in its report recommended for adoption and the language which it inserted in the bill to put the

policy into effect was enacted. Clearly, the taxpayer in the instant case is not one "who established a home and maintains his establishment and is taking on corresponding obligations of the home in any foreign country." He plainly fits into the pattern of the "technicians, American citizens who are merely temporarily away from home." Senator George stated that it was these persons that the Senate proposed to tax.

In the bill reported by the Senate Committee on Finance was inserted the provision which was subsequently enacted. It provided that the exemption should be extended to a citizen who "establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year." The Senate provision was explained in S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 54–55 (1942—2 Cum. Bull. 504, 548–549).

The detailed discussion of the technical provisions of the bill is in S. Rep. No. 1631, 77th Cong., 2d Sess., p. 116 (1942—2 Cum. Bull. 504, 591):

> *Section 150. Income From Sources Without United States in Certain Cases*
>
> Section 134 of the House bill, which corresponds to this section, would repeal subsection (a) of section 116 of the Code under which a citizen of the United States, bona fide non-resident of the United States for more than six months during the taxable year, was exempt from tax on earned income from sources without the United States.
>
> In lieu of the repeal of this section, your committee recommends that subsection (a) be

amended so as to change the test there provided to one of residence in a foreign country or countries during the entire taxable year. In the application of such provision, the tests as to whether a taxpayer is a resident of a foreign country or countries will be those generally applicable in ascertaining whether an alien is a resident of the United States. Vacation or business trips to the United States during the taxable year will not necessarily deprive a taxpayer, otherwise qualified, of the exemption provided by this section. This amendment is applicable to taxable years beginning after December 31, 1942, and the present law is retained for taxable years beginning prior to January 1, 1943.

In addition, subsection (a) of section 116 is amended so that a citizen of the United States, who has been a resident of a foreign country or countries for at least two years before the date on which he changes his foreign residence to a United States residence, shall be exempt with respect to earned income from sources without the United States derived during the period of his foreign residence. This amendment shall be applicable to taxable years beginning in 1942.

The House receded from its position and the Senate amendment was accepted. H. Conference Rep. No. 2586, 77th Cong., 2d Sess., p. 44 (1942–2 Cum. Bull. 701, 708).

These excerpts from the House and Senate Committee reports are significant indications of legislative intent. They contain no suggestion whatever that the section is to be applied in a "perspective" of protec-

tion of international trade and commerce which would benefit all employees of American business concerns who work an entire year outside the United States. To the contrary, the Senate report shows an intention to extend the exemption only to those who establish that they are bona fide residents of a foreign country. And the report does not stop there. It says who will be considered bona fide residents of a foreign country. In lieu of repeal of the section the Committee recommended that it be "amended so as to *change the test* there provided to one of residence in a foreign country or countries during the entire taxable year." (Italics supplied.) It further stated that "the tests as to whether a taxpayer is a resident of a foreign country or countries *will be those generally applicable in ascertaining whether an alien is a resident of the United States.*" [Italics supplied.] The only fair implication of the Committee's language is that those who do not meet the tests are not to be considered bona fide residents, regardless of how important their work may be to the promotion of trade and commerce. If its intention had been different, we submit the Senate Committee would have said so.

We think that the Senate Committee meant simply what it said when it stated that the test was to be changed by the amended section and that the applicable tests shall be the tests for determining whether an alien is a resident of the United States. The tests applicable to aliens involve concepts with which the Senate Committee was thoroughly familiar. Since the enactment of the first income tax provisions in

the Revenue Act of 1913, Congress has differentiated between resident and non-resident aliens.[4] Regulations have been in effect ever since the issuance of regulations under the Revenue Act of 1921,[5] which prescribed tests for determining the residential status of aliens in language substantially similar to that contained in the regulations in effect in 1942 when Section 116 (a) was amended. These regulations had been applied administratively and had been interpreted by the courts. The Senate Committee presumably understood the implications of the recommendations set forth in its report.

Following the interpretation stated in the Senate report, Section 29.116–1 of Treasury Regulations 111 was promulgated. It contains this sentence:

> Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211–2, 29.211–3, 29.211–4, and 29.211–5 relating to what constitutes residence or non-residence, as the case may be, in the United States in the case of an alien individual.

The Tax Court has decided a large number of cases within the past few months with respect to the exemption granted by Section 116 (a). In each of these cases, the Tax Court has applied the tests employed for determining whether an alien is a

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[4] Revenue Act of 1913, c. 16, 38 Stat. 114, Sec. II.

[5] See Article 311, Treasury Regulations 62, promulgated under the Revenue Act of 1921. See *Bowring* v. *Bowers*, 24 F. 2d 918 (C. C. A. 2d), for a discussion of the early statutory provisions and regulations with respect to the residential status of aliens.

resident of the United States. *Johnson* v. *Commissioner,* 7 T. C. 1040; *Hoofnel* v. *Commissioner,* 7 T. C. No. 1136 (now pending on petition for review in this Court, No. 11593); *Love* v. *Commissioner,* 8 T. C. 400; *Bouldin* v. *Commissioner,* 8 T. C. 110 (decided May 6, 1947); *Nesland* v. *Commissioner,* decided October 28, 1946 (1946 P–H T. C. Memorandum Decisions, par. 46,255); *Beauchamp* v. *Commissioner,* decided April 10, 1947 (1947 P–H T. C. Memorandum Decisions Service, par. 47,088); *Massaro* v. *Commissioner,* decided April 9, 1947 (1947 P–H T. C. Memorandum Decisions Service, par. 47,084).

The District Court in *Swenson* v. *Thomas,* 68 F. Supp. 390, *supra,* applied the same tests.

We submit that the Tax Court here has applied the correct rule of law and that the ultimate finding of fact that the taxpayer was not a bona fide resident of the British Isles and Northern Ireland during the year 1943 should not be disturbed if supported by the evidence. As hereinafter pointed out, the evidence adequately supports this conclusion.

II. The evidence supports the finding of the Tax Court that the taxpayer was not a bona fide resident of the British Isles and Northern Ireland during the taxable year 1943

The Treasury Regulations relating to aliens are designed for determining whether an alien is a resident of the United States whereas our problem in this case is to determine whether a United States citizen is a resident of a foreign country. It is, therefore, necessary to apply the regulations in reverse in order to obtain the desired determination under Section 116 (a) as amended.

The most important tests applied in determining whether an alien is a resident of the United States are set forth in Section 29.211–2 (Appendix, *infra*).

Applying this regulation under Section 116 (a) as amended, a United States citizen actually present in a foreign country who is not a transient or sojourner is a resident of such foreign country for the purposes of the income tax. We do not deny that the taxpayer was physically present in the British Isles and Northern Ireland during the year 1943. We content, however, that he was a "transient or sojourner" in the British Isles and Northern Ireland during that year.

The regulation specifically states that "whether he is a transient is determined by his intentions with regard to the length and nature of his stay." A person is a resident of a foreign country (1) if he has a mere floating intention, indefinite as to time, to return to the United States, (2) if he lives in a foreign country and has no definite intention as to his stay, and (3) if his purpose is of such a nature that an extended stay may be necessary for its accomplishment *and* to that end he makes his home there temporarily even though he may intend to return to his domicile in the United States when the purpose for which he came has been consummated or abandoned. If a person does not meet these tests he is a transient or sojourner. The regulations specifically say that if a person goes to a foreign country for a definite purpose which in its nature may be promptly accomplished, he is a transient.

It cannot be said that the taxpayer in the instant case had no "definite intention as to his stay" or

that he had a "mere floating intention, indefinite as to time" to return to the United States. He went to the British Isles and Northern Ireland for only one purpose—to make money by carrying out his contract with his employer. No other purpose is suggested by any of the evidence. When his work for his employer was completed it was his obvious intention to return to the United States. His contract with his employer provided for his return transportation to the United States. (R. 56, 59.)

The taxpayer was admitted to the British Isles on a visa as an employee of the Lockheed. Under British law this visa only permitted the taxpayer to remain within the British Isles for the purpose for which it was given, and if and when Lockheed terminated its work in the British Isles the taxpayer was expected to depart within a reasonable time and return to the United States. (R. 58.) Assuredly it may be said that the taxpayer definitely intended not to stay in the British Isles and Northern Ireland more than temporarily.

Every circumstance with respect to the taxpayer's stay in the British Isles and Northern Ireland indicates that he planned to be there only temporarily and that he intended to return to the United States and the family residence in Los Angeles, where his wife and three minor children resided. (R. 59.) The taxpayer made no application to become a citizen of Northern Ireland or a British subject. (R. 60.) He paid no income taxes to the government of Northern Ireland or the United Kingdom of Great Britain for the year 1943. (R. 60.) The taxpayer did not know

where or for how long he was going to be stationed in one place after he was assigned to work there. (R. 20, 25.) He was subject to being shifted from one place to another upon short notice. (R. 20, 25.) His living quarters and meals were provided by his employer and he had agreed to accept the accommodations provided. (R. 25–26.) The purely temporary character of his stay in the British Isles and Northern Ireland is demonstrated by the fact that 90% of his compensation was deposited to his credit by his employer with the California Bank in Los Angeles pursuant to Article 2 of the employment contract. (R. 60.)

The foregoing facts demonstrate plainly that the taxpayer was not a bona fide resident of the British Isles and Northern Ireland during the year 1943. We submit that he is not one of those persons "who established a home and maintains his establishment and is taking on corresponding obligations of the home in any foreign country" and for whom Senator George stated in the Senate hearings, *supra,* the exemption provided by Section 116 (a) was to be preserved. The taxpayer does not meet the tests laid down in the regulations relating to the residential status of aliens.

We do not contend that abandonment of a citizen's domicile in the United States is essential in order to qualify for the exemption granted by Section 116 (a). Domicile and residence are not synonymous under the provisions of the income tax law relating to the residence of aliens (*Bowring* v. *Bowers,* 24 F. 2d 918 (C. C. A. 2d)), and are not synonymous with respect to Section 116 (a). We believe, however, that the tax-

payer's intention in the instant case to return to the United States (R. 85) supports the court's conclusion that the taxpayer was not a resident of the British Isles and Northern Ireland.

In *Ingram* v. *Bowers,* 47 F. 2d 925 (S. D. N. Y.), affirmed on another point, 57 F. 2d 65 (C. C. A. 2d), the issue was whether Enrico Caruso was a resident or non-resident alien for income tax purposes. The evidence disclosed that he was born in Italy and always remained a subject of that country. For many years prior to his death in 1921 he spent about six months of each year in the United States. At the close of the operatic season he usually returned to Italy where he maintained an estate. His headquarters in the United States were at two hotels in New York. He married an American girl in 1918 and in 1919 a daughter was born in this country. His income in this country was substantial. The court found that he was not a resident of the United States, stating (p. 926):

> But I have no doubt that his status was that of a nonresident. *His original residence was in Italy, and there is no satisfactory evidence of an intention to abandon that residence.* His stays in the United States were transitory and, except for one or two occasions, were only for the purpose of fulfilling operatic and concert engagements. Granting that domicile and residence are not synonymous under the income tax statutes * * *, I am persuaded that Caruso's residence as well as domicile was in Italy. * * * [Italics supplied.]

Section 116 (a) of the Internal Revenue Code, as amended by Section 148 of the Revenue Act of 1942, does not provide that the mere absence of a United States citizen from the country for an entire taxable year brings the exemption into operation. Neither the language nor the legislative history of the section, when viewed in the light of the statements made by the Chairman of the Senate Committee on Finance and the statements in the report of the Senate Committee on Finance which wrote the amended section supports such a construction. The taxpayer nevertheless argues (Br. 12) that Congress intended that Section 116 (a) of the Internal Revenue Code, as amended, "should have a liberal and not a narrow and restricted meaning", and so seeks to bring himself within the intendment of the exemption provision. This, we do not concede, but even if it were true we do not think it would be enough to qualify the taxpayer for the exemption. Exemptions are not based upon inferences. *Pacific Co.* v. *Johnson,* 285 U. S. 480. Exemption statutes are not to be extended by implication and analogy. *United States* v. *Stewart,* 311 U. S. 60, 71.

We think that the taxpayer has failed to show that his case falls within the provisions of Section 116 (a) as amended. We think he is one of that class of persons, "technicians, American citizens who are merely temporarily away from home", who, Senator George at the Senate Hearings on the amendment, *supra,* stated, should be reached and properly dealt with for taxation purposes. The taxpayer plainly

does not come within the exemption requirements of the regulations relating to the residence of aliens which the Senate Committee report stated should be the criterion for administering the section.

The taxpayer seeks to distinguish the case of *Johnson* v. *Commissioner,* 7 T. C. 1040, on the ground that in that case Denmark had ceded to the United States exclusive jurisdiction over American citizens temporarily in Greenland under much the same circumstances as the taxpayer was present in the British Isles and Northern Ireland. The distinction sought to be made does not appear to be substantial. The taxpayer in the *Johnson* case was not required to pay Danish income taxes upon his compensation, and the taxpayer in the instant case, as a matter of fact, did not pay income taxes on account of his compensation to the government of Northern Ireland or to the United Kingdom of Great Britain for the taxable year involved. (R. 60.) Moreover, it does not appear that this slight factual difference furnishes any reliable aid to the question of statutory construction which was presented in the *Johnson* case and which is presented here.

CONCLUSION

The decision of the Tax Court should be affirmed.

Respectfully submitted,

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AUGUST 1947.

APPENDIX

Internal Revenue Code:

SEC. 116 [as amended by the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 148 (a)]. EXCLUSIONS FROM GROSS INCOME.

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) *Earned Income from Sources Without the United States.*—

(1) *Foreign Resident for Entire Taxable Year.*—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

(2) *Taxable Year of Change of Residence to United States.*—In the case of an individual citizen of the United States, who has been a bona fide resident of a foreign country or countries for a period of at least two years before the date on which he changes his residence from such country to the United States, amounts received from sources without the United States (except amounts paid by the United

States or any agency thereof), which are attributable to that part of such period of foreign residence before such date, if such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

* * * * *

(26 U. S. C. 1940 ed., Sec. 116.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.116–1.[6] *Earned Income From Sources Without the United States.*—For taxable years beginning after December 31, 1942, there is excluded from gross income earned income in the case of an individual citizen of the United States provided the following conditions are met by the taxpayer claiming such exclusion from his gross income: (a) It is established to the satisfaction of the Commissioner that the taxpayer has been a bona fide resident of a foreign country or countries throughout the entire taxable year; (b) such income is from sources without the United States; (c) the income constitutes earned income as defined in section 25 (a) if received from sources within the United States; and (d) such income does not represent amounts paid by the United States or any agency or instrumentality thereof. Hence, a citizen of the United States taking up residence without the United States in the course of the taxable year is not entitled to such exemption for such taxable year. However, once bona fide residence in a foreign

[6] This section was amended by T. D. 5373, 1944 Cum. Bull. 143, in respects not material to the instant case.

country or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a bona fide resident of a foreign country. Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211–2, 29.211–3, 29.211–4, and 29.211–5 relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.

* * * * *

SEC. 29.211–2. *Definition.*—A "nonresident alien individual" means an individual—

(a) Whose residence is not within the United States; and

(b) Who is not a citizen of the United States. The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or

abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

* * * * *

SEC. 29.211–4. *Proof of Residence of Alien.*— The following rules of evidence shall govern in determining whether or not an alien within the United States has acquired residence therein within the meaning of chapter 1. An alien, by reason of his alienage, is presumed to be a nonresident alien. Such presumption may be overcome—

(1) In the case of an alien who presents himself for determination of tax liability prior to departure for his native country, by (a) proof that the alien, at least six months prior to the date he so presents himself, has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien, at least six months prior to the date he so presents himself, has filed Form 1078 or its equivalent, or (c) proof of acts and statements of the alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident;

(2) In other cases by (a) proof that the alien has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien has filed Form 1078 or its equivalent, or (c) proof of acts and statements of an alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident.

In any case in which an alien seeks to over-

come the presumption of nonresidence under (1) (c) or (2) (c), if the internal-revenue officer who examines the alien is in doubt as to the facts, such officer may, to assist him in determining the facts, require an affidavit or affidavits setting forth the facts relied upon, executed by some credible person or persons, other than the alien and members of his family, who have known the alien at least six months prior to the date of execution of the affidavit or affidavits.

SEC. 29.211–5. *Loss of Residence by Alien.*— An alien who has acquired residence in the United States retains his status as a resident until he abandons the same and actually departs from the United States. An intention to change his residence does not change his status as a resident alien to that of a nonresident alien. Thus, an alien who has acquired a residence in the United States is taxable as a resident for the remainder of his stay in the United States.

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